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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 11

[EB Docket No. 04-296, PS Docket No. 15-94; FCC 18-102]

Review of the Emergency Alert System

AGENCY: Federal Communications Commission.

ACTION: [Petition for partial reconsideration](#); [final decision](#).

SUMMARY: In this document, the Federal Communications Commission (FCC or Commission) partially denies and partially grants a petition for partial reconsideration of the Emergency Alert System (EAS) requirements for certain Fixed Satellite Service (FSS) satellite operators jointly filed by PanAmSat Corporation, SES Americom, Inc., and Intelsat, Ltd.

DATES: Effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Gregory Cooke, Deputy Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau, at (202) 418-7452, or by email at Gregory.Cooke@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order on Reconsideration (Order) in EB Docket No. 04-296 and PS Docket No. 15-94, FCC 18-102, adopted on July 23, 2018, and released on July 24, 2018. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY-A257), 445 12th Street, SW., Washington, DC 20554. The full text may also be downloaded at: www.fcc.gov.

Synopsis

1. In the Order, the Commission partially denies and partially grants the petition for partial reconsideration (Petition) of the EAS requirements for FSS satellite operators jointly filed by PanAmSat Corporation, SES Americom, Inc., and Intelsat, Ltd. (Petitioners). Specifically, the

Commission denies Petitioners' request to shift the EAS obligations adopted for Ku band FSS licensees to the video programming distributors that lease transponder capacity from such licensees. The Commission also denies Petitioners' alternative request to not apply the FSS EAS rules to FSS satellite operations subject to satellite capacity lease agreements already in place when the FSS EAS requirements became effective. The Commission does, however, grant the Petition to the extent that it adopts more specific criteria for determining when EAS obligations are triggered for FSS licensees whose satellites are used to provide programming directed primarily to consumers outside the U.S., with only incidental reception by consumers in the U.S.

I. BACKGROUND

A. The EAS

2. The EAS is a national public warning system through which broadcasters, cable systems, and other service providers (EAS Participants) deliver alerts to the public to warn them of impending emergencies and dangers to life and property. The primary purpose of the EAS is to provide the President with "the capability to provide immediate communications and information to the general public at the national, state and local levels during periods of national emergency." The EAS also is used by state and local governments, as well as the National Weather Service, to distribute alerts.

B. The EAS First Report and Order

3. In 2005, in recognition that consumers were increasingly adopting digital technologies as replacements for analog broadcast and cable systems that were already subject to EAS requirements, the Commission adopted the First Report and Order and Further Notice of Proposed Rulemaking (First Report and Order) in EB Docket No. 04-296, 70 FR 71023, 71072 (Nov. 25, 2005), expanding EAS obligations to digital television and radio, digital cable, and satellite television and radio services. The Commission deemed that "some level of EAS participation must be established for these new digital services to ensure that large portions of the American public are able to receive national and/or regional public alerts and warnings."

4. With respect to satellite video services, the Commission, in part pursuant to its jurisdiction under section 303(v) of the Communications Act of 1934, as amended (the “Act”), to regulate direct-to-home (DTH) satellite services, extended EAS obligations to DBS services, as defined in section 25.701(a)(1)-(3) of the Commission’s rules. As used in section 25.701(a), the definition of DBS includes entities licensed to operate FSS satellites in the Ku band that “sell or lease capacity to a video programming distributor that offers service directly to consumers providing a sufficient number of channels so that four percent of the total applicable programming channels yields a set aside of at least one channel of non-commercial programming pursuant to [section 25.701(e) of the Commission’s rules]” (hereinafter, “DTH-FSS licensees”). The Commission anticipated that this definition would “ensure[] that the EAS rules apply to the vast majority of existing DTH satellite services, particularly those for which viewers may have expectations as to available warnings based on experience with broadcast television services.” With respect to compliance requirements, the Commission generally required DBS entities to participate in national EAS activations, and meet related monitoring, testing and equipment readiness requirements.

5. The Commission, however, allowed DTH-FSS licensees to delegate their EAS obligations to the video programming distributors that lease capacity on their satellites. Specifically, the Commission stated that “compliance with EAS requirements may be established based upon a certification from a [video programming] distributor that expressly states that the distributor has complied with the EAS obligations.” The Commission added that the DTH-FSS licensees “will not be required to verify compliance by distributors unless there is evidence that the distributor has not met its obligation.” The Commission concluded that placing ultimate compliance responsibility on the DTH-FSS licensees under this scheme was not unduly burdensome because the “certification requirements can be included in satellite carriage and leasing contracts,” and because it was similar to the certification scheme adopted for FSS Part 25 licensees to meet their DBS public interest obligations. The Commission declined to apply EAS

obligations to Home Satellite Dish (HSD) service, which also falls under the Commission's DTH jurisdiction.

C. The Petition

6. The Petitioners state that they "support the application of the EAS requirements to DTH-FSS services," but seek reconsideration of three aspects of the Commission's decision adopting such requirements. First, the Petition requests that the Commission modify the FSS EAS requirements adopted in the First Report and Order by applying them directly to the video programming distributors that lease transponder capacity from the DTH-FSS licensees instead of applying them to the DTH-FSS licensees themselves. Second, in the alternative, the Petition requests that the Commission not apply the FSS EAS rules to satellite transponder(s) that were subject to pre-existing satellite capacity lease agreements already in place when the FSS EAS requirements became effective. Third, the Petition requests that the Commission "provide an exemption from the EAS requirements for DTH-FSS services that are directed primarily to consumers outside the United States but also are made available to consumers in the United States."

7. With respect to their contention that responsibility for EAS compliance should be shifted from the DTH-FSS licensees to their lessee video programming distributors, Petitioners argue that, for all other services, the EAS rules apply to "the entity that delivers programming to the consumer and therefore is in a position to substitute emergency messages when the EAS system is activated." Petitioners contend that "[i]n the case of broadcast services, for example, the requirements apply to the stations that transmit programming to consumers' radio and television receivers." Petitioners contend that the Commission did not explain why it departed from this approach in the DTH-FSS case. Petitioners argue that DTH-FSS programming distributors are best situated to comply with the FSS EAS requirements because they are the entities that generate and control the program content that is delivered via the satellite. Petitioners also liken their situation to the HSD providers exempted from EAS obligations in the

First Report and Order in that, like HSD providers, DTH-FSS licensees do not control the programming that is transmitted over the satellite to HSD consumers.

8. With respect to the certification mechanism through which DTH-FSS licensees delegate responsibility for EAS obligations to their lessees, Petitioners argue that attaching EAS compliance obligations to DTH-FSS programming distributors through their capacity lease agreements with DTH-FSS satellite operators is inefficient, and does not provide for direct enforcement of compliance, but instead subjects resolution of compliance questions to private contract litigation.

9. Petitioners also request that the FCC exempt DTH-FSS services offered primarily outside the U.S., but incidentally made available to U.S. subscribers. Petitioners contend that such exemption is needed because “[i]t is highly improbable that the distributors of these services would be willing to preempt normal programming for announcements from the President of the United States.” Instead, according to Petitioners, these video programming distributors would cease marketing their services in the U.S., thus depriving the public of “access to valuable programming.” Petitioners further argue that applying EAS requirements in this context amounts to regulating the content of foreign programming. Petitioners thus propose that the Commission exempt DTH services directed “primarily in foreign countries” from EAS obligations, and suggest that the Commission “employ a standard of 50% of the area or population within a footprint for determining whether the primary audience for a DTH service is outside the United States.”

10. Two parties, EchoStar Satellite L.L.C. (EchoStar) and DIRECTV Latin America, LLC (DTVLA) filed oppositions to the Petition.

II. DISCUSSION

11. The Commission denies the Petition’s request to apply the FSS EAS requirements directly to the video programming distributors that lease transponder capacity from DTH-FSS licensees instead of applying them to the DTH-FSS licensees themselves. As a

practical matter, the Commission's ability to enforce the EAS requirements in this satellite context could be compromised if ultimate compliance responsibility were not placed on the DTH-FSS licensees. As the Commission observed in the DBS public interest certification proceeding (which implemented a certification regime upon which the DTH-FSS EAS certification scheme is modeled), the Commission has greater enforcement powers under the Act over satellite licensees than direct-to-home, non-licensee programmers, and it also has greater ownership information about such licensees than it has about these programmers. With respect to the DBS public interest certification scheme, the Commission concluded that "placing the ultimate compliance responsibility on the satellite licensees is not unduly burdensome." The Commission arrives at the same conclusion in the context of DTH-FSS EAS obligations. The Commission observes that over the past decade during which the DTH-FSS EAS rules have been in effect, the Commission has not been apprised by DTH-FSS licensees of any significant problems associated with their implementation. That the DTH-FSS licensees lease the use of their satellites to video programming distributors and other entities is a business model choice of their own making that the EAS certification regime for DTH-FSS licensees attempts to accommodate.

12. Petitioners contend that, in all cases but Petitioners', the Commission has applied the requirements associated with disseminating authorized EAS alerts "to the entity that delivers programming to the consumer," and that DTH-FSS has been treated dissimilarly without explanation. The Commission finds that this comparison is inaccurate and thus rejects Petitioners' request to shift the compliance burden to program suppliers. As Petitioners themselves point out, for broadcast services, broadcast licensees must disseminate authorized EAS alerts and follow other related requirements. Similarly, in the case of cable services, the cable operator is responsible for following these EAS requirements. These EAS obligations, in either instance, do not attach to the entity that supplies the programming. In the case of DTH-FSS satellites, it is the FSS satellite transponders—not the program suppliers—that transmit the programming to consumer receivers, and are thus similarly situated to the other types of entities

that participate in the EAS, and consequently, are appropriately subject to these EAS requirements.

13. The Commission also denies the Petition's alternative request that the Commission not apply the FSS EAS rules in instances where satellite transponders are subject to preexisting capacity lease agreements that were in effect before the FSS EAS obligations became effective. The FSS EAS obligations were adopted on November 10, 2005, but were not made effective until May 31, 2007. Petitioners argue that "[t]he FSS satellite operators have no means [] of requiring EAS compliance in connection with capacity agreements that were entered into prior to the effective date of the R&O." Petitioners subsequently argued that "many DTH-FSS capacity agreements are long-term contracts with terms extending beyond 2007." Petitioners did not specify how far beyond 2007 their capacity agreements entered into prior to the adoption of the FSS EAS requirements in 2005 might extend, and it is unclear whether any such agreements are still in effect today. That said, licensees in a regulated industry remain subject to new rules deemed by the Commission to be appropriate and in the public interest. As to the particular circumstances here, the Commission expects that such private arrangements would have included accommodations to account for changes in the regulatory or statutory framework. And, had such implementation issues persisted beyond that time frame, the Commission would have expected to see other indicia of such difficulties. In any event, the Commission observes that the FSS EAS certification regime was adopted as an optional mechanism through which DTH-FSS licensees can delegate the performance of EAS obligations for which they are ultimately responsible to their DTH-FSS video programming distributor lessees. While the Commission contemplated this as one option for meeting these obligations, it did not suggest that it would be the only one available. Accordingly, those DTH FSS licensees that do not consider it feasible or efficient to delegate performance of these obligations to their DTH-FSS video programming distributor lessees always have the option of relying on their own devices to meet these obligations themselves.

14. With respect to Petitioners' request that they be exempted from EAS requirements DTH-FSS services that are directed primarily to consumers outside the U.S., but incidentally received by consumers in the U.S., the Commission agrees with Petitioners that EAS obligations should not apply in such cases. The Commission does not believe it was intended for EAS obligations adopted in the First Report and Order to be applied to DTH-FSS-based services that are directed to consumers outside the U.S., but which incidentally include geographic overlap with the U.S. by virtue of the satellite transponder's footprint. In adopting the DBS service definition in section 25.701(a), the Commission emphasized that this definition would capture those services "for which viewers may have expectations as to available warnings based on experience with broadcast television services." Such expectations are unlikely to be shared by viewers outside the U.S. The Commission also observed that "extending national level EAS requirements to DBS providers serves the public interest by ensuring that the significant portion of the American public that are DBS subscribers have access to this critical emergency information." To require that programming intended for consumers outside of the U.S. comply with the EAS rules would significantly increase regulatory burdens on DTH-FSS service providers without delivering a measurable benefit to an unintended U.S. audience that is unlikely to be watching the DTH-FSS programming. Such a result would be inconsistent with the Commission's stated rationales and intent for extending EAS obligations to DBS services. At the same time, the Commission is mindful that U.S. consumers who have a reasonable basis to expect that EAS alerts will be offered over such DTH-FSS services receive alerts consistent with those expectations.

15. Accordingly, in balancing these policy objectives, the Commission grants partial reconsideration of its EAS rules to Petitioners to ensure that DTH-FSS licensees deliver EAS alerts to DTH-FSS service consumers within the United States that have an expectation that they will receive EAS alerts, rather than to U.S.-based consumers who incidentally receive such DTH-FSS services. Petitioners have argued that the DTH-FSS EAS obligations should be triggered

based on the U.S. territory encompassed within the FSS licensee's transponder footprint and propose a trigger based on whether 50% of the area or population within the DTH-FSS transponder footprint is within the contiguous United States (CONUS). The Commission agrees that the geographic area covered by the DTH-FSS transponder footprint is an appropriate measure of whether the DTH-FSS is focused on U.S. consumers, but disagrees that it should be the sole measure. Use of geographic area coverage area alone could exclude substantial portions of the U.S. from receiving EAS alerts where consumers could reasonably expect EAS to be provided. For example, under Petitioners' suggestion, a DTH-FSS transponder could be centered on a U.S. city on the border with Mexico and have DTH-FSS service that is marketed actively to U.S. consumers in that city, but would be exempt from the EAS rules if more than 50% of the transponder footprint covered Mexico. The Commission does not find such a result to be in the public interest.

16. The Commission therefore establishes multiple criteria by which it will determine whether the DTH-FSS programming is directed to a United States audience for purposes of determining EAS obligations, or is merely incidentally received: (1) whether the center of the footprint of the antenna beam associated with the transponder used to provide the DTH-FSS service is within the United States; (2) whether at least 50 percent of the footprint of the antenna beam associated with the transponder used to provide DTH-FSS covers territory within the United States; or (3) whether the DTH-FSS service is marketed to U.S. consumers, either through advertising campaigns or promotional materials that are focused on potential subscribers located within the United States. If any of these three factors is present, the Commission finds that it is likely that the DTH-FSS service is focused on U.S. consumers, and therefore is within the intended scope of the Commission's EAS rules.

17. Finally, with respect to the DTH-FSS EAS obligation triggering criteria that the video program distributor's service include a sufficient number of channels such that four percent of the total applicable programming channels yields a set aside of at least one channel of non-

commercial programming, the Commission observes that the Commission previously has clarified that this four percent set aside threshold is not triggered until at least 25 channels of video programming are being offered. To the extent it was not clear that this earlier finding also applies in the FSS EAS context, the Commission incorporates it here.

III. PROCEDURAL MATTERS

A. Accessible Formats

18. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

B. Supplemental Final Regulatory Flexibility Analysis

19. As required by the Regulatory Flexibility Act of 1980 (RFA), as amended, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM) in EB Docket No. 04-296, 69 FR 52843 (Aug. 30, 2004). The Commission sought written public comment on the proposals in the NPRM, including comments on the IRFA. No comments were filed addressing the IRFA. The Commission included a Final Regulatory Flexibility Analysis (FRFA) in the First Report and Order and Further Notice of Proposed Rulemaking (First Report and Order) in EB Docket No. 04-296, 70 FR 71023, 71072 (Nov. 25, 2005). This Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) supplements the FRFA to reflect the actions taken in this Order and conforms to the RFA.

1. Need for, and Objective of, the Order

20. In the First Report and Order, the Commission extended Emergency Alert System (EAS) obligations to digital television and radio, digital cable, and satellite television and radio services. Among other things, the Commission extended EAS obligations to Direct Broadcast Satellite (DBS) services, as defined in section 25.701(a)(1)-(3) of the Commission's rules. As used in section 25.701(a), the definition of DBS includes entities licensed to operate Fixed Satellite Service (FSS) satellite in the Ku band that "sell or lease capacity to a video

programming distributor that offers service directly to consumers providing a sufficient number of channels so that four percent of the total applicable programming channels yields a set aside of at least one channel of non-commercial programming pursuant to [section 25.701(e) of the Commission's rules]" (hereinafter, "DTH-FSS licensees").

21. In this Order, the Commission grants, to the extent described herein, a petition for partial reconsideration of the First Report and Order jointly filed in 2005 by PanAmSat Corporation, SES Americom, Inc., and Intelsat, Ltd. (collectively, Petitioners). In particular, the Commission denies all the specific requests made by Petitioners, and clarifies the criteria triggering when the EAS obligations apply to DTH-FSS licensees.

2. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

22. There were no comments filed that specifically addressed the proposed rules and policies presented in the IRFA.

3. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

23. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rule(s) as a result of those comments.

24. The Chief Counsel did not file any comments in response to the proposed rule(s) in this proceeding.

4. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply

25. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted herein. The RFA generally defines the term "small entity" as having the same meaning as the

terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

26. As noted above, a FRFA was incorporated into the First Report and Order. In that analysis, the Commission described in detail the small entities that might be significantly affected by the rules adopted in the First Report and Order. In this Order, the Commission hereby incorporates by reference the descriptions and estimates of the number of small entities from the previous FRFA in this proceeding.

5. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

27. The data, information and document collection required by the First Report and Order as described in the previous FRFA in this proceeding is hereby incorporated by reference. The actions taken in this Order do not amend or otherwise revise those requirements, except to refine the criteria that determine when DTH-FSS licensees are subject to EAS obligations. More specifically, the Commission finds that the criteria triggering DTH-FSS EAS obligations only applies in instances where the FSS capacity sold or leased to the video programming distributor is effected over a DTH-FSS transponder for which (1) the center of the footprint of the antenna beam associated with the transponder used to provide the DTH-FSS service is within the United States, (2) at least 50 percent of the footprint of the antenna beam associated with the transponder used to provide DTH-FSS covers territory within the United States, or (3) where the DTH-FSS service is marketed to U.S. consumers, either through advertising campaigns or promotional materials that are focused on potential subscribers located within the United States. If any of these three factors is present, the Commission finds that it is likely that the DTH-FSS service is focused on U.S. consumers. This aspect of the decision is consistent with the Commission’s

intent expressed in the First Report and Order for extending EAS alert delivery to American subscribers of DBS services.

6. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

28. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) and exemption from coverage of the rule, or any part thereof, for small entities.”

29. The analysis of the Commission’s efforts to minimize the possible significant economic impact on small entities as described in the previous FRFA in this proceeding is hereby incorporated by reference.

Report to Congress

30. The Commission will not send a copy of this Order, including this Supplemental FRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of this Order, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of this Order and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.

D. Additional Information

31. People with Disabilities. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

32. Additional Information. For additional information on this proceeding, contact

Gregory Cooke of the Public Safety and Homeland Security Bureau, Policy and Licensing Division, gregory.cooke@fcc.gov, (202) 418-2351.

IV. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED that pursuant to sections 1, 2, 4(i), 4(o), 301, 303(r), 303(v), 307, 309, 335, 403, 624(g), 706, and 715 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(o), 301, 303(r), 303(v), 307, 309, 335, 403, 544(g), 606, and 615, this Order on Reconsideration IS ADOPTED, and the petition for partial reconsideration filed by PanAmSat Corporation, SES Americom, Inc., and Intelsat, Ltd. is hereby GRANTED as described herein, and otherwise DENIED.

34. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order on Reconsideration, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Katura Jackson,
Federal Register Liaison Officer,
Office of the Secretary.

